CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1937.

MORGAN ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 581. Argued March 10, 11, 1938.—Decided April 25, 1938. Petition for rehearing denied May 31, 1938.

1. An order of the Secretary of Agriculture fixing the maximum rates to be charged by market agencies (commission men) at stockyards *held* void for failure to allow the "full hearing" before the Secretary required by the Packers and Stockyards Act. *Morgan* v. *United States*, 298 U. S. 468. P. 13.
2. In administrative proceedings of a quasi-judicial character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play. These demand a fair and open hearing. P. 14.
3. In requiring a "full hearing," the Packers and Stockyards Act has regard to judicial standards,—not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. Those requirements relate not only to the taking and consideration of evidence but also to the concluding, as well as to the beginning and intermediate, steps in the procedure. P. 19.
4. The proceeding was begun by a general notice of inquiry into the reasonableness of the rates of market agencies at the Kansas City Stockyards. Thousands of pages of testimony were taken by an examiner and numerous complicated exhibits were introduced, bearing upon all phases of the broad subject of the businesses in question. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and

argument, was refused. Oral argument, before an Assistant Secretary, was general and sketchy and did not reveal in any appropriate manner the Government's claims. The Government submitted no brief and furnished no statement of its contentions. Numerous and elaborate findings were prepared by subordinates who had conducted the proceedings for the Government, and were submitted to the Secretary, who accepted them, with certain rate alterations. No opportunity was afforded the appellants to examine the findings until they were served with the order fixing rates which they claim to be confiscatory. A rehearing was refused by the Secretary. The Secretary did not read the testimony, but examined it somewhat to get its drift; he did not hear the oral argument but read a transcript of it and the appellants' briefs, and conferred *ex parte* concerning the findings with the subordinates who prepared them. *Held:*

(1) The right to a "full hearing" embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. P. 18.

(2) No such reasonable opportunity was accorded in this case. P. 19.

(3) In all substantial aspects, the proceeding was an adversary one—a prosecution by the Government of the owners of the market agencies threatening the existence of the agencies and the owners' means of livelihood. P. 20.

(4) An earlier order containing findings of facts and fixing a schedule of rates, which was set aside because of changes in economic conditions, could not avail to remedy the defects in the conduct of the latter proceeding here in question. P. 21.

(5) The action of the Secretary in accepting and making as his own the findings which had been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them, was more than an irregularity in procedure; it was a vital defect. P. 21.

5. A petition for rehearing based upon the grounds of inconsistency of the decision on this appeal with rulings on the earlier appeal, 298 U. S. 468, and upon the ground of surprise—is denied. P. 23.
6. Questions as to the disposition of moneys impounded in the District Court representing charges for market-agency services paid in excess of the rates fixed by the void order, are for that court to decide. P. 26.

23 F. Supp. 380, reversed.

APPEAL from a decree of the District Court, constituted of three judges, which dismissed the bills in fifty suits, consolidated for hearing, challenging the validity of maximum rates fixed by the Secretary of Agriculture for market agencies at the Kansas City Stock Yards. A former appeal is reported in 298 U. S. 468. The present report includes an opinion delivered May 31, 1938, denying a rehearing. Summaries of the arguments on the procedural questions are extracted from the main briefs used on the hearing.

Messrs. Frederick H. Wood and *John B. Gage,* with whom *Mr. Thomas T. Cooke* was on the brief, for appellants.

It is not necessary, in order to meet the requirements of a "full hearing," that the Secretary, in person, should hear all of the evidence or that he should read it all. On the other hand, the requirements of a "full hearing" are not met if, as testified to by the Secretary in this case, the order merely represents his "independent conclusion as based upon the findings" of his subordinates, or his "own independent reactions to the findings of" such subordinates. It is not enough that he has exercised an independent judgment of his own predicated upon findings of fact made by others. Nor that he has satisfied himself, as an executive might, after making some inquiries of his subordinates, that he is willing to

adopt their findings. He is, as stated by this Court, "the trier of the facts" and as such required to weigh the evidence upon which the findings depend, and upon which, in turn, his conclusions and ultimate determinations are based. This duty may not be delegated to or performed by others.

It is true that the "evidence . . . taken may be sifted and analyzed by competent subordinates," 298 U. S. 481, but this clearly means that the sifting and analysis must be of the evidence as a whole upon any controverted issue of fact or in respect of which any ultimate findings of fact must be based. It may not be a one-sided analysis. If variant or contrary inferences may be drawn from the evidence, the subordinates may not choose between them but must fairly present both sides of the evidence, so that the authorized tribunal may make his choice. If an ultimate or evidentiary finding of fact, controversial in character, requires for its determination consideration of evidence relating to different but related subjects, without the weighing of all of which no ultimate or evidentiary finding may be made, then such analysis must fairly set forth these several descriptions of evidence and their relation to the possible ultimate or evidentiary inferences presented. To what extent the Secretary may rely upon such analyses without examination of the record himself in respect of controverted questions, it is unnecessary to discuss. This is so because it plainly appears from the record as a whole that no such analysis of the evidence was made and submitted to him by any subordinate.

The law is not concerned with the mechanics employed. What it does require is that the findings of fact shall be those of the Secretary himself, made only after a weighing and appraisal of the evidence, however that evidence may be submitted to him for consideration.

In leaving the findings of fact to his subordinates, the Secretary proceeded upon the erroneous assumption that the delegation of the legislative power to fix rates was to the Department of Agriculture rather than to the Secretary in person.

The evidence as to the manner in which the findings, submitted to the Secretary and accepted by him, were prepared, discloses the absence of any quasi-judicial weighing or appraisal of the evidence by those who prepared them. The record discloses that neither the evidence nor the argument was thereafter weighed or appraised by the Secretary.

The findings prepared by the Secretary's subordinates do not constitute such a "sifting and analyzing" of the evidence as to absolve the Secretary from weighing and appraising the evidence itself.

The Secretary did not weigh and appraise the evidence concerning salesmanship performance, the findings concerning which are based on the flimsiest kind of evidence and are the most important of all.

The Secretary accepted without change findings made by his subordinates in respect of sales performance, apparently under the misapprehension that they were supported by actual performance, without any examination of the evidence in respect thereof, which, if made, would have disclosed the contrary.

The Secretary did not weigh and appraise the evidence upon which the order's so-called reasonable cost assigned to business-getting and maintaining was predicated.

The Secretary did not weigh and appraise the evidence bearing upon the reasonable cost of yarding or office salaries, but accepted the findings submitted upon a misunderstanding of their import.

Neither the fragmentary oral statements of his subordinates as to what some of the evidence was nor the

Secretary's hit or miss "investigation into" the record is an acceptable substitute for his weighing and appraising the evidence as a whole.

The altering by the Secretary of a few rates in the tentative order in no way tends to prove he weighed and appraised the evidence. Had he filled in a wholly blank schedule he would be no better off.

The inexorable requirement of a fair trial before an impartial tribunal, which shall render judgment upon the evidence, is not met where, without any allegation that any rates are unreasonable, and without any disclosure of their contentions as to the ultimate facts proved or the principles intended to be applied to them, the findings and order to be made are prepared by opposing counsel and, without the knowledge of the appellants or their counsel, submitted to the trier of the facts who, after private unrecorded conferences with opposing counsel, issues an order in accordance therewith, without himself weighing or appraising the evidence upon controverted issues.

There was no allegation or suggestion in the original order of inquiry that any of appellants' rates were unjust, or unreasonable or discriminatory. The "Order Granting Rehearing" was not more explicit in these respects.

Counsel for the Government, in his argument, presented no issues of fact. Where he did refer to individual agencies he paid them the highest possible compliment as to efficiency of operation. He stated that in his opinion the rates under investigation were not discriminatory and that none of the appellants were making too much money under the existing rates.

Nothing occurred in the course of the oral argument to forecast the fact that the Assistant Secretary was not to pass upon the issues but was to retire from further con-

sideration of the case. No statement indicated that a tentative report was to be prepared by the attorneys for the Government and a Government economist, an important witness for the Government. It was not suggested that the proposed findings and order, without having been first served upon counsel for appellants, would be presented to the Secretary personally and discussed with him by the attorneys for the Government in unrecorded conferences, out of the presence of appellants' counsel. Appellants' counsel, without the benefit of a complaint containing specific allegations as to the unreasonableness of any rates, having before him in the evidence a cost study prepared after extensive audits by Government accountants showing experienced costs to be in excess of receipts under existing rates, and without any knowledge of the contents of the tentative report, prepared a brief which was filed with the Assistant Secretary. No briefs were filed or served by the Government.

The proposed findings and order so prepared by the attorneys for the Government, together with certain memoranda prepared in part by the economist who was a Government witness in the case, was presented to the Secretary. The Secretary, according to his testimony, after examining the record casually, took the order, the briefs, and transcript of oral argument home with him. He states that he read the tentative order and part, at least, of the briefs. After discussing the matter with counsel for the Government in private unrecorded conferences, he changed, to an unimportant extent, a few figures expressing individual rates, and signed the order as proposed, otherwise unchanged, on June 14, 1933.

This he did without weighing or appraising the evidence on controverted issues of fact and without familiarizing himself with any part thereof except as com-

municated to him in *ex parte* oral conversations with his subordinates including the attorney prosecuting the case. No record was kept of these conversations, but it appears they were fragmentary and unaccompanied by any weighing and appraising of the evidence by the Secretary. And this although the findings accepted are directly contrary to statements in appellants' administrative briefs. Such a course of administrative procedure constitutes neither a full hearing nor due process of law.

The more extensive the employment of the implement of the administrative tribunal becomes—and its use is daily becoming more widespread—and the more credit which is given to its decisions, the more important is it that strict regularity be observed in the conduct of its hearings and that all the elements of a full and fair hearing and of due process of law be accorded. See Lord Chief Justice Hewart, "The New Despotism," pp. 50-51.

It is not contended by appellants that in cases where a fair and proper method has been adopted for limiting the issues, whether it be a tentative report of the Examiner or otherwise, the tribunal passing judgment must review or appraise all of the evidence relating to non-controversial as well as controversial issues. Nor is it contended that in order that there be a full hearing, oral argument or oral presentation is essential in every instance—for by other methods the trier of the facts may become so adequately informed as to enable himself to properly appraise the evidence. Nor is it contended that the order is void solely by reason of the fact that the attorneys for the prosecution, assisted by a witness for the prosecution, prepared it,—for had such an order, so prepared, been followed by presentation of it to counsel for appellants with full opportunity to refute the conclusions expressed therein before him whose duty it was to resolve the evidence into findings, the requirement of a fair trial

could be met if the Secretary weighed and appraised all of the evidence upon the findings questioned by appellants' counsel. A court or administrative tribunal may for its convenience require submission of issues upon written statement—if such written statements are, under conditions fairly permitting reply, made known to opposing parties. Evidence may for the assistance of the one charged with the responsibility of decision be fairly analyzed by impartial and competent assistants, unbiased by previous partisan connection with the proceeding. Where, however, issues are not defined and limited by means and methods fair to all persons affected or to be affected, fair analyses or synopses of the evidence are not prepared by impartial or competent assistants, and the one deciding the issues does not personally review and weigh and appraise the evidence, a full hearing is not had in accordance with statutory and constitutional requirements.

Assuming that, as claimed, the Secretary read oral and written argument, nevertheless it is clear that he did not judicially weigh and appraise the same, since he admittedly adopted the vitally important inferences drawn by his subordinates from the evidence, and rejected the widely differing inferences asserted by appellants in their briefs, without weighing or appraising the evidence upon which either set of inferences was based.

The order should be set aside because unsupported by essential findings of basic facts, because the fundamental findings of fact therein are not supported by substantial evidence, because based upon an erroneous conception of the law and of the powers of the Secretary, because based upon a departure from recognized and accepted standards, both of reasonableness and of administrative procedure, and because arbitrarily made.

Solicitor General Jackson and *Mr. Wendell Berge*, with whom *Ass't Solicitor General Bell*, and *Messrs. Hugh B. Cox, James C. Wilson, Edward J. Ennis*, and *G. N. Dagger* were on the brief, for the appellees.

The contention that the decision of a quasi-judicial officer, made upon a proper record after full hearing of argument, may be declared to be void on the ground that it was insufficiently considered is without precedent. In its prior decision, this Court held that where it was alleged that the Secretary heard neither evidence nor argument a case was made for judicial investigation. It did not hold that where he had heard argument, judicial investigation may test the adequacy of his further consideration of the case. The detailed facts of the Secretary's physical examination of arguments and evidence and the detailed mental processes which he employed in reaching his determination are not a proper subject for judicial inquiry. Appellants' contention is, in essence, an endeavor to avoid, by a novel doctrine of judicial review, the established rule that the findings of a quasi-judicial officer, made after hearing or reading full argument on a proper record submitted to him, can be attacked only by showing that the findings are in fact unsupported by the evidence.

The question of the scope of the issue is not of controlling importance in the present case. Should this Court decide that it is free to look behind the fact that the Secretary read and considered appellants' arguments, it will find that the evidence shows that the Secretary fully complied with any procedural standard that may reasonably be imposed.

The Secretary made his decision on the basis of his own personal consideration and appraisal of the evidence and argument. The transcript of record was in his possession and, while he did not read it consecutively or in full, he

consulted it wherever in his judgment such consultation was necessary. As a guide to his examination of the record he studied the arguments of appellants directed to the evidence and compared them with the voluminous findings of fact, which constituted a summary and analysis of the evidence. Having read and considered the tentative findings of fact and the arguments of appellants, he made an investigation into the record—assisted by consultation with members of the Department—for the purpose of considering and appraising the evidence upon which the findings were made. Uncontradicted testimony establishes that the Secretary, in the exercise of his independent judgment, altered three of the most important items in the tentative schedule of rates. With respect to all the numerous questions raised by appellants, persuasive evidence exists to show independent inquiry and the exercise of independent judgment by the Secretary. By asserting that the Secretary did not give them a fair hearing, appellants have assumed the burden of proving by clear and convincing evidence that the Secretary did not consider their arguments or the evidence to which those arguments related.

Appellants renew their objection that they were not given an opportunity to file exceptions to an examiner's report or to tentative findings of fact, and to present argument in support of those exceptions. This Court has already passed on this argument. [Citing *Morgan* v. *United States*, 298 U. S. 468, 478.] The practice which the Court described as desirable has now been established in proceedings under § 307 of the Act. See Order of September 16, 1936, 1 Federal Register 1362. It remains true, however, that the failure to follow it is not fatal to the validity of the hearing.

Appellants also complain that in his oral argument counsel for the Department did not apprise them of the

issues which they might be expected to meet, and they refer to statements he made which were in agreement with their contentions. It is not to be supposed that the appellants were prejudiced by such friendly statements in oral argument or that appellants' counsel needed the assistance of Government counsel, or of an examiner's report, or of tentative findings of fact, to determine what the important issues in the proceeding were. It is common knowledge that often in ordinary litigation the argument addressed by counsel to the court is made before the submission of proposed findings of fact or conclusions of law, and that the argument of opposing counsel does not in every case disclose with clarity the issues on which the case is to be decided. Such circumstances when they exist can hardly be said to amount to a denial of a full hearing.

Furthermore, it should be noted that, at the time of the oral argument and when petitioners filed their supplemental brief with the Secretary, they had before them an order, which had been signed on May 18, 1932, by the Secretary of Agriculture, containing findings of fact and fixing a schedule of rates. At the time the rehearing was granted, the Secretary had set this order aside. The record upon which that order had been made was a part of the record before the Secretary at the time of the rehearing, and the order served to inform the appellants of the nature of the issues involved. That it did so inform them is shown by the fact that much of appellants' supplemental brief was devoted to a discussion of this order, and that in the course of that discussion they advanced most of the contentions which they make with respect to the order now under attack.

Appellants attempt to distinguish this present situation from one in which a court adopts findings prepared by counsel on the ground that a court affords opposing

counsel an opportunity to submit findings of his own or to except to the findings which are adopted. There is no force in this distinction. Although the appellants were not given an opportunity to except to the tentative findings of fact, they had an unrestricted opportunity to submit findings of their own to the Secretary of Agriculture which he could have considered. They did not take advantage of that opportunity; but that is not a circumstance which can be held against the Secretary of Agriculture. There is no logic in appellants' suggestion that the adoption of findings is done independently if opposing counsel has a chance to criticize those findings, but must be presumed not to have been done independently if the opportunity to criticize is not afforded.

The order of the Secretary is based upon correct principles of law and is supported by substantial evidence.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case presents the question of the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yards. Packers and Stockyards Act, 1921, 42 Stat. 159; 7 U. S. C. 181–229. The District Court of three judges dismissed the bills of complaint in fifty suits (consolidated for hearing) challenging the validity of the rates, and the plaintiffs bring this direct appeal. 7 U. S. C. 217; 28 U. S. C. 47.

The case comes here for the second time. On the former appeal we met, at the threshold of the controversy, the contention that the plaintiffs had not been accorded the hearing which the statute made a prerequisite to a valid order. The District Court had struck from plaintiffs' bills the allegations that the Secretary had made the order

without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. We held that it was error to strike these allegations, that the defendant should be required to answer them, and that the question whether plaintiffs had a proper hearing should be determined. *Morgan* v. *United States,* 298 U. S. 468.

After the remand, the bills were amended and interrogatories were directed to the Secretary which he answered. The court received the evidence which had been introduced at its previous hearing, together with additional testimony bearing upon the nature of the hearing accorded by the Secretary. This evidence embraced the testimony of the Secretary and of several of his assistants. The District Court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and, on the merits, that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute and (2) that the order was arbitrary and unsupported by substantial evidence.

The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the

rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304, 305; *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 393; *Morgan* v. *United States, supra.* And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a *"full hearing."* § 310.[1]

In the record now before us the controlling facts stand out clearly. The original administrative proceeding was begun on April 7, 1930, when the Secretary of Agriculture issued an order of inquiry and notice of hearing with re-

[1] Section 310 of the Packers and Stockyards Act (42 Stat. 159, 166; 7 U. S. C. 211) provides:

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; . . ."

spect to the reasonableness of the charges of appellants for stockyards services at Kansas City. The taking of evidence before an examiner of the Department was begun on December 3, 1930, and continued until February 10, 1931. The Government and appellants were represented by counsel and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. On May 18, 1932, the Secretary issued his findings and an order prescribing maximum rates. In view of changed economic conditions, the Secretary vacated that order and granted a rehearing. That was begun on October 6, 1932, and the taking of evidence was concluded on November 16, 1932. The evidence received at the first hearing was re-submitted and this was supplemented by additional testimony and exhibits. On March 24, 1933, oral argument was had before Rexford G. Tugwell as Acting Secretary.

It appears that there were about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits. The oral argument was general and sketchy. Appellants submitted the brief which they had presented after the first administrative hearing and a supplemental brief dealing with the evidence introduced upon the rehearing. No brief was at any time supplied by the Government. Apart from what was said on its behalf in the oral argument, the Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused.

Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government, and were submitted to the Secretary, who signed them, with a few

changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. They dealt with the practices and facilities at the Kansas City livestock market, the character of appellants' business and services, their rates and the volume of their transactions, their gross revenues, their methods in getting and maintaining business, their joint activities, the economic changes since the year 1929, the principles which governed the determination of reasonable commission rates, the classification of cost items, the reasonable unit costs plus a reasonable amount of profits to be covered into reasonable commission rates, the reasonable amounts to be included for salesmanship, yarding salaries and expenses, office salaries and expenses, business getting and maintaining expenses, administrative and general expenses, insurance, interest on capital, and profits, together with summary and the establishment of the rate structure. Upon the basis of the reasonable costs as thus determined, the Secretary found that appellants' schedules of rates were unreasonable and unjustly discriminatory and fixed the maximum schedules of the just and reasonable rates thereafter to be charged.

No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the Secretary but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. The evidence had been received before he took office. He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the

oral argument, he took home with him and read. He had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows:

"My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry."

Save for certain rate alterations, he "accepted the findings."

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government pro-

poses and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was "very general," as he said, in order not to take up "too much time." It dealt with generalities both as to principles and procedure. Counsel for appellants then discussed the evidence from his standpoint. The Government's counsel closed briefly, with a few additional and general observations. The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order.

Congress, in requiring a "full hearing," had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master

or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood, and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services and will be compelled to go out of business. And to this the Government responds that if as a result of the prescribed rates some agencies may be unable to

continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426) places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry.

Equally unavailing is the contention that the former Secretary of Agriculture had made an order in May, 1932, containing findings of fact and fixing a schedule of rates, of which appellants were apprised. Because of changes in economic conditions, the Secretary himself had set aside that order and directed a rehearing. This necessarily involved, as the Secretary found, a consideration "of changes both general and particular" which had "occurred since the year 1929" and brought up all the questions pertinent to the new situation to which the additional evidence upon the rehearing was directed. The former findings and order were no longer in effect and it is with the conduct of the later proceeding that we are concerned.

The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires "relates to substance and not form." Conceivably, the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear

the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

As the hearing was fatally defective, the order of the Secretary was invalid. In this view, we express no opinion upon the merits. The decree of the District Court is

Reversed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration and decision of this case.

A PETITION FOR REHEARING, FILED ON MAY 20, 1938, WAS DENIED ON MAY 31, 1938.

PER CURIAM.

The Solicitor General moves for a rehearing of this case upon two grounds:

First. The first ground is that the Court has reversed itself; that the present decision is "directly contrary to the law of the case" as established by the Court's decision on the former appeal, *Morgan* v. *United States,* 298 U. S. 468; and that "a procedural omission" previously held "to be of no significance" is now regarded as "fatally defective."

These assertions are unwarranted. Not only are the two decisions consistent, but the rule announced in our former opinion was applied and was decisive of the present appeal. And the Government is in no position to claim surprise. The question whether there had been a fair hearing in the present case, in the light of the situation disclosed by the Secretary's testimony and the other evidence, was fully argued at the bar. Appellants presented, both orally and in an elaborate brief, with copious references to the record, the contention which we sustained.

The first appeal was brought to this Court because the plaintiffs had been denied an opportunity to prove that the Secretary of Agriculture had failed to give them the full hearing which the statute required. Their allegations to that effect had been struck out by the District Court. 8 F. Supp. 766. We held its ruling to be erroneous and that the question whether the plaintiffs had a proper hearing should be determined, saying:

"But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them."

The case was then tried by the District Court upon that issue. From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below. Because such action fails to satisfy the requirement of a full hearing stated in our first opinion and quoted above, we reversed the judgment of the District Court which sustained the order.

Testimony of the Secretary and his associates, disclosed what had actually occurred. It appeared that the oral argument before the Assistant Secretary had been general and sketchy; that, aside from the oral argument, which did not reveal the claims of the Government in any appropriate manner, the Government had submitted no brief and no statement of its contentions had been furnished; that in this situation findings had been prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government; that these findings, 180 in number, were elaborate, dealing with all phases of the practices and facilities at the Kansas City live-stock market, the services and methods of the plaintiffs, and the costs and profits which should be allowed them as reasonable. These findings, prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied.

The statement made in the petition for rehearing that the present decision is contrary to the law of the case as declared in our first opinion is wholly unfounded. Our decision was not rested upon the absence of an examiner's report. So far from departing from our former opinion,

or from the statement that the mere matter of the presence or absence of an examiner's report was not itself determinative, we reiterated both that statement and the principle underlying it in our opinion on the present appeal. We said:

"Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

"No such reasonable opportunity was accorded appellants.

"The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires 'relates to substance and not form.' Conceivably the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings."

And, then, pointing out the distinction and the serious defect in the procedure in the instant case, we added:

"But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after

an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect."

The distinction was again brought out in our recent decision in the case of *National Labor Relations Board* v. *Mackay Radio & Telegraph Co., post,* p. 333, where the mere absence of an examiner's report was found not to be controlling, as the record showed that in that case the contentions of the parties had been clearly defined and that there had been in the substantial sense a full and adequate hearing.

The effort to establish a case for rehearing, either because of an asserted inconsistency in our rulings or because of lack of opportunity for full argument, is futile.

Second. The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

The petition for rehearing is denied.

MR. JUSTICE BLACK dissents.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration of this petition.